

Hearing:  
February 11, 2004

**THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB**

Mailed:  
April 21, 2004  
Paper No. 8  
Bucher

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

Diamonique Corporation

v.

Wieck Family, Ltd.<sup>1</sup>

Opposition No. 91123296  
against Application Serial No. 76052817

Manny D. Pokotilow and Salvatore Guerriero of Caesar Rivise  
Bernstein Cohen & Pokotilow, Ltd. for Diamonique  
Corporation.

William G. Lane of William G. Lane, Inc., P.C., for Wieck  
Family, Ltd.

Before Chapman, Bucher and Bottorff, Administrative  
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Wieck Family, Ltd. seeks registration on the Principal  
Register of the mark DIAMONELLE for goods identified as

---

<sup>1</sup> According to the records of the Assignment Division of the United States Patent and Trademark Office, this application was assigned to Opal Pacific, LLC on May 14, 2001, as reflected at Reel 2336 Frame 0962.

"jewelry made of precious metals with cubic zirconia<sup>2</sup> with or without semi-precious stones,"<sup>3</sup> in International Class 14.

On June 13, 2001, registration was opposed by Diamonique Corporation on the grounds that it owns registrations for the mark DIAMONIQUE for "jewelry with simulated gemstones, namely white and colored simulated gemstones, including simulated diamonds,"<sup>4</sup> in International Class 14, and for "precious stones, namely, colored and white simulated diamonds for use in jewelry other than school class rings, recognition jewelry and sports award jewelry,"<sup>5</sup> also in International Class 14; that applicant's mark, when used in connection with the identified goods, so resembles opposer's mark as to be likely to cause confusion, to cause mistake or to deceive; and that given the fame of opposer's DIAMONIQUE mark, applicant's use of

---

<sup>2</sup> Cubic zirconia is "a synthetic gemstone, ZrO<sub>2</sub>, used in jewelry as an artificial diamond." The American Heritage® Dictionary of the English Language (Fourth Edition 2000).

<sup>3</sup> Application serial number 76052817 was filed on May 19, 2000 based upon applicant's allegation of use in commerce at least as early as May 1, 2000.

<sup>4</sup> Registration Number 1532950 issued on April 4, 1989; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>5</sup> Registration Number 1538103 issued on May 9, 1989; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

its mark causes dilution of opposer's mark under the Federal Trademark Dilution Act of 1995.

Applicant, in its answer, denied all the salient allegations of opposer's claims. Both parties fully briefed the case, but only opposer made an appearance at an oral hearing held before the Board.

We sustain the opposition.

The record consists of the pleadings; the file of the involved application; and as opposer's case-in-chief, applicant's answers to opposer's first set of interrogatories and the accompanying documents, submitted under opposer's notice of reliance of May 1, 2002; the trial testimony deposition, with attached exhibits, of Neal S. Grabell, opposer's senior vice president and general counsel; the trial testimony deposition, with attached exhibits, of Michael Rappeport, founding partner of R.L. Associates, a survey research and consulting firm; and the rebuttal testimony deposition of Michael Rappeport. Applicant, as its case-in-chief, has furnished the testimony, with exhibits, of Albert Gardner, production manager for third-party corporation, Diamonair, Incorporated; the testimony, with exhibits, of Leon B. Kaplan, president of the Princeton Research & Consulting Center; the testimony, with exhibits, of Robert Paul

Stockwell, retired Professor of Linguistics at U.C.L.A.; and applicant's notice of reliance on a number of third-party registrations, submitted on November 12, 2002.

Opposer manufactures and markets a wide variety of jewelry with simulated gemstones, including cubic zirconia. Opposer has been using the DIAMONIQUE mark in connection with jewelry continuously since 1970 (initially adopted and used by its predecessor in interest). According to the testimony of opposer's witness, Neal S. Grabell, opposer's sole shareholder is QVC, Inc., and a majority of opposer's goods are currently sold through the QVC television channel distributed over nationwide cable and satellite systems. QVC's home shopping television program is broadcast to more than 80 million homes in all fifty states of the United States. Since QVC began selling DIAMONIQUE jewelry in 1987, DIAMONIQUE has been the largest single brand (Grabell Trial Deposition at 12) among all the brands of goods that QVC sells.<sup>6</sup> QVC shipped more than twenty million units of jewelry under the DIAMONIQUE mark between the years 1993 and 2001, generating sales revenues of almost \$1.4 billion.<sup>7</sup>

---

<sup>6</sup> QVC reportedly has approximately forty thousand products in its active inventory (Grabell Trial Deposition at 10).

<sup>7</sup> While the majority of opposer's sales are generated by promotions on cable television, opposer also sells DIAMONIQUE  
(cont. on following page)

It appears from applicant's discovery responses made of record by opposer that applicant uses its marks in connection with items of jewelry having simulated gems. These manufactured gems include simulated diamonds and other simulated gemstones such as emeralds, sapphires and rubies. (Applicant's answer to Interrogatory No. 2, Exhibit 1 to opposer's notice of reliance) The involved application identifies the goods as "jewelry made of precious metals with cubic zirconia with or without semi-precious stones."

**Evidentiary Objections**

Before turning to the merits of the case, we must consider several evidentiary disputes that have arisen between the parties.

One such dispute involves opposer's objections to the testimony deposition of applicant's expert witness, Dr. Leon B. Kaplan. First, opposer seeks to strike the testimony in its entirety on the ground that applicant failed to provide during discovery Dr. Kaplan's report entitled "An Evaluation of Consumer's Perceptions of

---

jewelry through its online shopping site at QVC.com, QVC outlet stores, through QVC's Insider and Current magazines, and through Target retail stores. (Grabell Trial Deposition at 20, 22 - 23, 31 - 32, 36 - 37)

Diamonique and Diamonesque." Second, opposer seeks to strike those portions of the Kaplan testimony involving assertedly leading questions about opposer's showing of acquired distinctiveness and questions regarding the compliance of Dr. Michael Rappeport's survey with the Federal Judicial Center's Manual for Complex Litigation.

As to opposer's motion to strike the Kaplan testimony in its entirety, applicant argues as follows:

A critique of the other party's survey report does not constitute a market research study, a survey, a test, and the like. Applicant had no knowledge of Dr. Rappeport's study and report until the day of Dr. Rappeport's deposition. The report was furnished to Applicant's counsel at the deposition and not prior thereto. It was only later that Applicant decided after reviewing Dr. Rappeport's transcript of the deposition testimony and his report that the decision was made to have Dr. Rappeport's report critiqued by a survey expert. This study and report were limited to [a] critique of Dr. Rappeport's report and did not involve any independent survey, study, market research tests, or the like. Dr. Kaplan's study did not commence until almost six months after the close of discovery and Dr. Kaplan's report was not finalized until the day prior to his deposition. When the final report was completed, it was promptly facsimiled to Opposer's attorney the day before Dr. Kaplan's testimony deposition. Applicant never refused and never failed to provide the report. Clearly it is impossible to provide a report that was not completed and did not even exist during the discovery period and it is impossible to provide a report before the report is finalized.

(Applicant's brief, p. 3)

We find that applicant has offered a reasonable explanation for the timing of Dr. Kaplan's report. Accordingly, we deny opposer's motion to strike this testimony in its entirety. Secondly, inasmuch as Dr. Kaplan is an expert witness, his testimony is not susceptible to the power of suggestion. Hence, we find it is permissible for applicant's counsel to have put leading questions to applicant's expert witness. We overrule opposer's objections to these portions of Dr. Kaplan's testimony, and permit his answers to these leading questions to be part of the evidentiary record.

A second and similar dispute involves opposer's objections to the testimony deposition of applicant's expert witness, Dr. Robert P. Stockwell. First, opposer seeks to strike the testimony in its entirety on the ground that applicant failed to provide during discovery Dr. Stockwell's expert letter report. Second, opposer seeks to strike those portions of the Stockwell testimony involving assertedly leading questions about the similarity of the DIAMONIQUE and DIAMONELLE marks.

As to opposer's motion to strike the Stockwell testimony in its entirety, applicant argues as follows:

The discovery period closed on January 13, 2002, three days after the request for production of documents was mailed. The

response to Opposer's first request for production of documents was mailed on February 9, 2002.

Dr. Stockwell's report did not relate to or refer to the use of Applicant's mark in connection with any products and/or services marketed, offered for sale, advertised or promoted by Applicant, including ... those related to confusion or likelihood of confusion between Applicant's products and/or services and Opposer's products and/or services. The bottom line is that the request for production of documents did not envision or encompass the linguistic study carried out by Dr. Stockwell.

The second point is that Dr. Stockwell's study was not initiated and his report was not initiated and completed until after, way after, the close of discovery.

The third point is that Dr. Stockwell's report, a draft thereof dated June 20, 2002, was mailed to Opposer's counsel on July 18, 2002. Applicant's attorney and Opposer's attorney discussed the entry of the report and Opposer's attorney said that he might consider stipulating to the entry of the report... The bottom line is that even though the final report is dated June 20, 2002, the final report was not completed until September but retained the original date.

(Applicant's brief, p. 4)

Again, this report was not in existence at the time of opposer's discovery request. Hence, we find that applicant has offered a reasonable explanation for the timing of the submission of Dr. Stockwell's report and we deny opposer's motion to strike the same. Secondly, inasmuch as Dr. Stockwell is an expert witness, we find it is permissible

for applicant's counsel to have put leading questions to Dr. Stockwell and permit his answers to these leading questions to be part of the evidentiary record. Hence, we overrule opposer's objections to these portions of Dr. Stockwell's testimony, and permit his answers to these leading questions to be part of the evidentiary record.

### **Priority**

There is no dispute as to opposer's Section 2(d) priority, in view of opposer's pleaded registrations, made of record in this proceeding by appropriate identification and introduction during the testimony of Mr. Grabell.<sup>8</sup> See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

### **Likelihood of Confusion**

Accordingly, we turn to the issue of whether or not a likelihood of confusion exists in this case. In making this determination, we have followed the guidance of In re

---

<sup>8</sup> During Mr. Grabell's testimony, a more recently issued registration for the mark DISCOVER DIAMONIQUE for "home shopping services in the field of general merchandise by means of cable television," in International Class 35 (Reg. No. 2490674, issued on September 18, 2001) was also made of record.

While opposer did not move to amend its pleading, to whatever extent it is necessary, we consider the pleading amended to conform to the evidence under Fed. R. Civ. P. 15(b). Therefore, opposer's Registration No. 2490674 is considered of record herein.

E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). The du Pont case sets forth the factors that should be considered, if relevant, in determining likelihood of confusion.

We turn first to the similarity of the goods as described in the involved application and in opposer's registrations and in connection with which its prior mark has been in use. Opposer uses its mark in connection with jewelry having simulated gemstones, including simulated diamonds. Applicant's use is also on simulated diamonds and jewelry designs having other simulated gemstones. Hence, for purposes of a determination of likelihood of confusion under the provisions of the Lanham Act, the goods are legally identical.

As to the du Pont factors focusing on the similarity or dissimilarity of established, likely-to-continue trade channels and the conditions under which and buyers to whom sales are made, in view of the identity of goods, and in view of the absence of any restrictions in applicant's and/or opposer's identification of goods as to trade channels or classes of purchasers, we further find that the parties' respective goods move in the same trade channels, and are marketed to the same classes of ordinary

purchasers.<sup>9</sup> These facts weigh in favor of a finding of likelihood of confusion.

We turn then to the du Pont factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). Where, as in the present case, the marks would appear on virtually identical goods, the degree of similarity between the marks which is necessary to support a finding of likely confusion declines. Century 21

---

<sup>9</sup> Applicant argues that because opposer's evidence shows that the average purchase price of opposer's jewelry items is seventy dollars, these are clearly not impulse items. We agree with applicant that this level of expenditure suggests greater care on the part of consumers than would "a fifty-cent can of soup," for example. On the other hand, we cannot conclude from such a mathematical exercise that we are faced, as a result, with sophisticated purchasers herein.

Real Estate Corp. v. Century Life of America, 970 F.2d 874,  
23 USPQ 1698 (Fed. Cir. 1992).

In making the case for why these marks are confusingly similar, opposer argues as follows:

... Both marks possess the dominant feature "DIAMON" in the beginning of each mark. Although "DIAMON" may be a suggestive term, meaning "diamond," it is this term in each mark which gives the mark its primary significance, and would be the word most likely to be impressed upon the minds of purchasers and to be remembered and used in calling for the goods. Moreover, Applicant's mark follows the same pattern as Opposer's mark, combining the term "DIAMON" with a French-like term ("IQUE" and "ELLE"), which when viewed as a whole, convey similar overall commercial impressions. Opposer respectfully submits that the meaning of the terms "IQUE" and "ELLE" are likely to be unfamiliar to American consumers; thus, consumers are likely to have a hazy recollection of these terms and simply perceive them as terms from a foreign language, probably French ...

(Opposer's reply brief, pp. 22 - 23)

By contrast, applicant argues that the DIAMON- root is descriptive of the goods and services, making opposer's mark inherently weak. Applicant's linguistic expert, Dr. Robert Stockwell, explains that "DIAMON- is an artificially truncated root not existing in normal English parlance" (i.e., it is used in commercial contexts like trademarks), that still "retains the basic root reference ('a gem

stone') ..."<sup>10</sup> of the root word DIAMOND. Applicant goes on to argue that these entirely different suffixes "change the appearance of the marks, change the pronunciation of the marks, gives the marks different connotations, and gives the marks different commercial impressions." Applicant continues:

... Opposer contends that the ordinary consumer would not be sophisticated enough to appreciate the difference in sound, appearance and meaning between the suffixes "ique" and "elle." Actually, these suffixes appear in other English words that are commonly used, such as Mademoiselle and technique. ...

(Applicant's brief, p. 18)

Dr. Stockwell also confirms that these suffixes (-IQUE and -ELLE) are both English language suffixes borrowed from the French language at vastly different periods of time. The -IQUE suffix suggests "related to" while the -ELLE suffix is a diminutive suffix - meaning a smaller one of the same type. He opines that the "suffixes of the marks DIAMONIQUE and DIAMONELLE are semantically, phonetically and historically different"; and that "[t]he marks DIAMONIQUE and DIAMONELLE are not pronounced alike and do

---

<sup>10</sup> Stockwell Trial Deposition at 24 - 25; Exhibit 129 at unnumbered pages 2 - 3.

not sound alike because of the differences in their suffixes."<sup>11</sup>

As to appearance, the marks each consist of a single, three-syllable word having ten letters in which the first two syllables are identical. Hence, the marks are similar in appearance. As to connotation, consumers will not find these two set of suffixes as foreign as opposer would suggest with its citations to cases discussing "a jaw-breaking string of consonants."<sup>12</sup> On the other hand, these are coined words where neither suffix creates a connotation for the entire mark that one could easily derive or verbalize. Finally, while it is beyond debate that the respective sounds of the final syllables are different - *ēk* versus *el* - they are not radically different. Hence, we find that the marks are somewhat similar in overall commercial impression, and this factor favors opposer slightly. How decisive a factor this proves to be, in the final analysis, is really a function of whether the record demonstrates that opposer's DIAMONIQUE is a strong mark.

---

<sup>11</sup> Stockwell Trial Deposition at 29 - 35; Exhibit 129 at unnumbered pages 3 - 4.

<sup>12</sup> Stabilisierungsfonds fur Wein v. Peter Meyre Winery GmbH, 9 USPQ2d 1073, 1075 (TTAB 1988).

Accordingly, we turn to the related du Pont factor focusing on the number and nature of similar marks in use on similar goods. Applicant argues that the third-party registrations of "Diamon-" and "Diamond-" formative marks coexisting on the federal trademark registry show that the United States Patent and Trademark Office has clearly taken the position that numerous such marks do not result in a likelihood of confusion.<sup>13</sup> Of course, applicant's own expert, Dr. Stockwell, concludes that each of these third-party marks (and including each of the marks involved in this proceeding), taken as a full word, "is pronounced differently from any of the others."

In response to applicant's arguments, opposer contends that these third-party registrations are "unpersuasive and insufficient to show that Opposer's mark is lacking in distinctiveness or entitled only to narrow protection in relation to the issue of likelihood of confusion."

(Opposer's brief, p. 29)

In the only proof of actual use by any of these third parties, applicant submitted the testimony of Albert

---

<sup>13</sup> DIAMOND-ITE (Reg. No. 0843690), DIAMONTRIGUE (Reg. No. 1175519), DIAMONTOLOGY (Reg. No. 1453574), DIAMONESS (reg. No. 2107566), DIAMONAIR (Reg. No. 2345366), DIAMONTI (Reg. No. 2,589629), DIAMONLITE (Reg. No. 2735231), and DIAMONDNA (Reg. No. 2821473).

Gardner, an employee of Diamonair Incorporated, about its use of the DIAMONAIR mark over a period of thirty-three years. However, as opposer has argued, we find that key portions of Gardner's testimony were vague and indefinite. As reflected in the transcript of his testimony, the proffered information on Diamonair's sales volume is largely useless, devoid, as it is, of any time frame or unit of measurement.<sup>14</sup> Furthermore, we know only that Diamonair's mark was stamped on the inside shank of rings, on the mountings of pendants and on the posts of earrings. Hence, it is not clear how noticeable this mark was to the eyes of consumers. Finally, references to Diamonair's appearance at a single trade show targeted to retailers is not persuasive of widespread awareness of the mark by ordinary consumers.<sup>15</sup>

Moreover, opposer cites to Standard Brands Incorporated v. RJR Foods, Inc., 192 USPQ 383 (TTAB 1976)

---

<sup>14</sup> Q: What is your employer's sales volume?

A: An average is - right now, around six million, maybe a little bit more.

(Gardner Trial testimony, pp. 18 - 19)

<sup>15</sup> Opposer referred in its brief to newly available information contained in a paper filed with the Securities and Exchange Commission (SEC) regarding an organization known as D.G. Jewelry Inc. (allegedly the parent of Diamonair Incorporated) that allegedly went into receivership on October 10, 2002. This was untimely and inappropriately inserted into the record, and hence, was not considered by the Board.

[CHERRY ROYAL fruit-flavored drinks likely to cause confusion with ROYAL drink mixes] in an attempt to minimize the weight accorded to this alleged evidence of third-party usage:

With the exception of the trademark "ROYAL CROWN" for cola, the use of which was acknowledged by opposer's witness, there is no evidence that any of the third parties' marks shown in the registrations submitted by applicant is in use and the extent of use of "ROYAL CROWN" is not shown. There is no proof that the purchasing public that buys opposer's goods and would buy applicant's goods has been so conditioned by exposure to a plethora of "ROYAL" marks for the same or closely related goods in the market that customers have been educated to distinguish between different "ROYAL" marks on the basis of minute distinctions. The mere submission of registrations does not supply the proof. See: Stanadyne, Inc. v. Lins, 180 USPQ 649 (CCPA, 1974).

We cannot conclude from this record that consumers have actually been exposed in the marketplace to any of these other DIAMON- formative marks such that they are conditioned to look to the suffix on a DIAMON- formative mark on jewelry to determine the source of the item of jewelry.

Even if we were to presume some exposure to these third-party marks, we find that the overall commercial impressions of opposer's mark and of applicant's mark are

much closer to each other than either of them are similar to the impressions of any of these third-party marks.<sup>16</sup>

We turn, then, to a most critical du Pont factor in the instant case, and that is the fame of opposer's prior mark. We find that opposer has demonstrated by a preponderance of the evidence that its DIAMONIQUE mark is a well-known mark in the United States for jewelry having simulated gemstones, including simulated diamonds. The following table shows shipments of DIAMONIQUE products and the total airtime DIAMONIQUE products received on the QVC shopping channel:

---

<sup>16</sup> Dr. Stockwell's report reflected the reactions of an expert linguist to each of the following third-party marks by noting something about their suffixes, construction and/or overall connotations:

- DIAMOND-ITE: suggests a mineral;
- DIAMONTRIGUE: a curious blend of root words suggesting "intrigue about diamonds";
- DIAMONTOLOGY: suggest a person who works with gemstones but this coined word has an unnecessary letter "t";
- DIAMONAIR: suggests "debonair" or "millionaire";
- DIAMONDNA: treats initialism DNA as if it were a suffix; curious combination inasmuch as DNA is found only in chromosomal matter;
- DIAMONTI: this DIAMON- root would be pronounced differently than the other marks herein, placing the stress on the -MON- syllable
- DIAMONLITE: perhaps suggesting the "light" that shines through the stone, but overall mark has no resemblance to either DIAMONELLE or DIAMONIQUE.

(Stockwell Trial Deposition Exhibit 129 at unnumbered pages 3 - 4)

<b>Year</b>	<b>Units <u>shipped</u></b>	<b>Dollars <u>shipped</u></b>	<b>Minutes of <u>Airtime</u></b>
<b>1993</b>	1,160,169	\$ 87,992,663	24,100
<b>1994</b>	1,181,504	\$ 94,613,965	22,287
<b>1995</b>	1,842,538	\$ 130,214,430	21,320
<b>1996</b>	2,409,752	\$ 155,588,849	21,669
<b>1997</b>	2,156,344	\$ 150,481,769	21,677
<b>1998</b>	2,348,218	\$ 164,930,630	22,117
<b>1999</b>	3,038,829	\$ 184,208,736	21,906
<b>2000</b>	2,922,277	\$ 201,186,338	22,229
<b>2001</b>	<u>3,168,423</u>	<u>\$ 213,762,340</u>	<u>22,773</u>
<b>Total</b>	20,228,054	\$ 1,382,979,720	200,078

(Opposer's exhibit 20)

According to the testimony of opposer's witness, Neal S. Grabell, during these extended on-air presentations, the DIAMONIQUE mark is used prominently several places on the television screen. The host or hostess repeatedly mentions the trademark as he/she displays the ring, bracelet, pendant, necklace or earrings. The jewelry box, packaging, hangtags and any pieces of enclosed literature contain the mark. (Grabell Trial Deposition at 19) Opposer also advertises in QVC's own Insider and Current magazines as well as in TV Guide magazine. (Grabell Trial Deposition at 27) In fact, one article made of record credited QVC with giving cubic zirconia "its first big push into the jewelry boxes of the American public." ("Faux Sparklers Sub for Diamonds," Omaha World-Herald (Neb.), February 26, 1998, Opposer's Exhibit No. 15)

In order to corroborate the degree of consumer recognition for the DIAMONIQUE mark, opposer submitted an expert report entitled "Consumers' Perceptions of Diamonique and Diamonesque." This report was based upon a mall intercept survey conducted by Dr. Michael Rappeport in November and December 2001 for opposer's litigation against another mark - a civil action in a federal district court [Diamonique Corporation v. Valuevision International, Inc., Civil Action No. 01-CV-6551 (E.D. Pa.)]. Because DIAMONIQUE jewelry is sold primarily through a television shopping channel, Dr. Rappeport testified that he limited his sampling to women who had purchased something from any cable or satellite television channel in the previous year. Dr. Rappeport argued that to the extent this was over inclusive (not limited to those who purchased jewelry through a television channel dedicated exclusively to shopping), it was only damaging to opposer's position. Nonetheless, according to Dr. Rappeport, the respondents reflected 24% unaided recognition of DIAMONIQUE as a product sold through QVC and/or other television shopping channels. Dr. Rappeport explained that this means that a significant portion of those who buy products from home shopping channels recognize that DIAMONIQUE is a brand associated with, and sold through, QVC.

Applicant, in turn, hired Dr. Leon B. Kaplan to review this survey and report. During his testimony in this case, Dr. Kaplan declared the Rappeport survey and report to be so fatally flawed as to be worthless in demonstrating acquired distinctiveness for the DIAMONIQUE mark. He objected to the way the universe was "operationalized" for the survey, the way the questionnaire was constructed and the way the data was analyzed.

Without discussing in detail Dr. Kaplan's criticisms of Dr. Rappeport's report, we find that the accumulation of specific weaknesses and minor omissions he has highlighted reduce the probative value of this report to the point that we cannot be sure that, standing alone, this report demonstrates strength for this mark in the way opposer contends. Nonetheless, we find that the significant levels of promotion and sales of DIAMONIQUE jewelry shown in the record is consistent with the conclusions that opposer would have us draw from this study, namely that the term DIAMONIQUE has acquired distinctiveness, and indeed, is a well-known mark, for jewelry having simulated diamonds and other simulated gemstones.

Upon balancing all the relevant du Pont factors, and giving each its appropriate weight, we find a likelihood of confusion herein.

**Dilution**

Finally, we note that opposer also contends that given the fame of opposer's DIAMONIQUE mark, applicant's use of its mark causes dilution of opposer's mark under the Federal Trademark Dilution Act of 1995. However, given our determination that opposer has priority of use and that there is a likelihood of confusion herein, we find it unnecessary to reach a determination on the question of dilution in this proceeding.

*Decision:* The opposition is sustained on the ground of likelihood of confusion and registration to applicant is hereby refused.